Supreme Court, U.S.
FILED
MAR 14 2000
CLERK

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONER

Timothy Jones
W. Allen Bennett
Sagaser, Franson & Jones, P.C.
2445 Capitol St.
Second Floor
Fresno, CA 92721

Thomas C. Goldstein
(Counsel of Record)
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

March 10, 2000

QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF OF THE PETITIONER 1

TABLE OF AUTHORITIES

Pages

Cases

City of Fresno v. *California*, 372 U.S. 627 (1963) 8
Dugan v. *Rank*, 372 U.S. 609 (1963) 8
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) 8
United States v. *James*, 478 U.S. 597 (1986) 1, 2, 4

SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner respectfully submits this Supplemental Brief to respond to the Supplemental Brief filed by Respondent on March 10, 2000.

* * * *

1. Before addressing the substance of the government's supplemental filing, it is most important to make clear that Respondent's arguments are irrelevant to the determination whether certiorari should be granted. Putting aside the parties' disagreement about what the government did or did not argue below, several points are indisputable. First, the Ninth Circuit categorically held in this case that the Flood Control Act confers immunity despite the fact that the Madera Canal "is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project." Pet. App. 9a (emphasis added). Second, the Ninth Circuit correctly recognized (as have Justice Stevens and three other circuits, Pet. 17) that the Ninth Circuit's standard for awarding immunity conflicts with not only a decision of this Court but also decisions of several other circuits. Pet. App. 5a, 9a. Third, as the numerous decisions of the lower courts and indeed Respondent's own filing in an earlier case demonstrate, this is an important question that recurs frequently. Pet. 23-25. Fourth, by granting certiorari this Court would resolve the conflict. Because the lower courts dismissed this case on the pleadings, this case is not muddied by disputes over the status of the water involved and instead squarely presents the purely legal issue on which the lower courts are divided: whether the government must prove a factual nexus to flood control functions. If the Court decides that such a nexus is required (as *United States* v. *James*, 478 U.S. 597, 605 (1986), plainly states it is) then the case will be remanded for determination of that factual issue.

2. The import of Respondent's Supplemental Brief is that it "take[s] very seriously the statements in petitioner's reply that representations made by the United States are 'false' (Pet. Reply 9) and 'seriously disingenuous' (*id.* 1, 5)." Rightly so. To the extent that Petitioner's Reply caused offense, we certainly apologize. Petitioner's counsel have twice appeared with the United States as *amicus* on the merits in this Term and have made clear their extraordinary respect for the work of the Solicitor General, a point that we repeat here so that there is no ambiguity. But the Reply made those statements not based on a "disagreement with [the government] on a question of law," Supp. 9, but instead because of the sincere conviction based on a thoroughgoing review of the record that the BIO should have been more forthcoming.

3. As to the substance of Respondent's supplemental filing, the government's error is plain in light of the issue on which the circuits are divided. This Court held in *James* that the Flood Control Act confers immunity only for "waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as waters that such projects cannot control." 478 U.S. at 605. Several circuits therefore require proof that the water has a nexus to both a "federal flood control project" *and also* "purposes of or related to flood control." Pet. App. 5a, 9a; Pet. 18-23. The Ninth Circuit, by contrast, avowedly has "delete[d]" the second part of the *James* formulation and requires only proof that the waters are not "wholly unrelated" to a flood control project. Pet. App. 7a-8a.

As the Petition and Reply explained in great detail through numerous quotations from the government's filings in the lower courts, Respondent's position below was that it was entitled to immunity under settled Ninth Circuit precedent so long as there was a nexus to a "federal flood control project." Pet. 5-7; Reply Br. 2-3. Respondent never maintained that the waters that damaged Petitioner's farm served a flood control purpose. Particularly relevant to the govern-

ment's position in this Court, Respondent never *mentioned* even in passing its principal argument in this Court that the Friant Dam holds snow and rain melts that subsequently are released into the Madera Canal. *Compare* BIO 6-11.

Respondent is correct that its Motion in the district court did go beyond the pleadings (and Petitioner's Reply Brief never contended otherwise), Supp. 3, but is not correct about the substance of the government's argument below. The complaint in this case alleges that Petitioner was damaged by irrigation water leaking from the Madera Canal.[1] Nothing in

---

[1] C.A. Rec. 2 (Compl. ¶ 7 ("Plaintiff is informed and believes and thereon alleges that defendant UNITED STATES planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through Plaintiff's property as shown in Exhibit 'A.'")). Respondent cannot seriously assert that the complaint was somehow ambiguous because it "does not allege that the waters were not also flood waters." Supp. 2. The complaint adverts to only a single kind of water. Indeed, that was Respondent's express understanding of the complaint in the district court, the court of appeals, and indeed in the BIO. C.A. Rec. 146 (Motion 9 ("It is the Central Valley Project's flood control purpose, not the component's non-flood-control purpose, that governs. Under the well-settled Ninth Circuit rule [citations omitted] the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley Project is dispositive.")); *id.* 11 ("The Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were used *solely* for irrigation." (emphasis added)); Gov't C.A. Br. 5 ("The damage sustained by Central Green resulting from a water leak from the Madera Canal that was used *for irrigation* is well within this circuit's test for applicability of the flood control immunity created by 33 U.S.C. § 702c." (emphasis added)); *id.* 6 ("In *Morici Corp.* v. *United States*, 681 F.2d 645 (9th Cir. 1982), which like this case concerned the Central Valley Project, the Court held that damage caused by a multipurpose water project authorized for flood control is within the scope

the complaint asserted that the Canal was part of the Central Valley Project. In moving for Judgment on the Pleadings, the government therefore had to go beyond the text of the complaint to establish that (a) the Madera Canal was part of the CVP (through an exhibit to the complaint), and (b) the CVP had flood control among its authorized purposes (through earlier Ninth Circuit decisions).[2] Respondent thus went beyond the pleadings to establish only that the first part of the *James* formulation was satisfied in this case, which it successfully maintained was the sole relevant issue under Ninth Circuit precedent.

Respondent did *not*, as it now suggests, attempt in its Motion to go beyond the pleadings to establish that the *second* part of the *James* test was satisfied, *i.e.*, that the Madera Canal served a flood control function.[3] But that is precisely

---

of § 702c immunity even if the particular component of the project that caused the damage was used *exclusively for other purposes*." (emphasis added)); BIO 2 ("The canal supplies water for irrigation from Millerton Lake, a reservoir created by Friant Dam on the San Joaquin River.").

[2] *See* C.A. Rec. 139 (Motion 2 (only statement of fact not drawn from the text of the complaint: "The Madera Canal is part of the Central Valley Project. Compl., Exhibit B, at 1, first 'Whereas' paragraph.")); *id.* 145 (Motion 8 ("In a facial attack, documents attached to the complaint are part of the complaint.") (citations omitted)).

[3] Indeed, its statement of the appropriate legal standard precluded such an argument. The government maintained that the district court, in resolving a Motion for Judgment on the Pleadings, must determine whether the defendant's challenge was (a) "facial," permitting dismissal only if "the plaintiff can prove no set of facts in support of his claim," or (b) "factual," in which case "the court can hear conflicting evidence." C.A. Rec. 141 (Motion 4 (citation omitted)). Every indication from the face of the Motion is that Respondent regarded it as "a facial attack," in which the plaintiff's allegations must be resolved in its favor. C.A. Rec. 142 ("[i]n a facial attack the court is not limited strictly to the face of the com-

what it attempted to do in the Brief in Opposition in order to establish that (contrary to the conclusion of the panel in this case) the decision below does not conflict with *James* or decisions of other circuits. *See* BIO 11-16. Respondent says in its Supplement that "we recited Congress's purpose in establishing the CVP, with citations to the Department of the Interior report, to support our position that the 'irrigation waters' in the Madera Canal are simply released 'flood waters' made available from time to time by discharges from the Friant Dam." Supp. 6; *see also id.* ("The release of flood waters from the Friant Dam in part contributes to making irrigation from the Madera Canal possible."). Our point is simply that the government did not make that argument in the lower courts and should have so-advised this Court. To repeat, Respondent contended below that it was entirely irrelevant whether the waters in question were flood waters, and that the government was required to prove *only* that the first part of the *James* test was satisfied. Thus, the government's unambiguous position in its Motion and its reply (which the district court accepted) was that the government is entitled to immunity notwithstanding that the waters in question were used only for irrigation purposes. C.A. Rec. 146 ("[Ninth Circuit

---

plaint"); *id.* ("Additionally, in a facial attack a District Court may rely on exhibits to the complaint."); *id.* 144 ("[a]ccepting plaintiff's allegations as true, the Court should hold plaintiff's claims barred by section 702c"); *id.* 145 ("In a facial attack, documents attached to the complaint are part of the complaint."). In point of fact, it is not possible to construe the government's Motion as a "factual" attack – in which the district court could resolve whether Petitioner was damaged by flood waters – for the simple reason that *Respondent did not attempt to introduce any evidence for the district court to consider*. Certainly, the district court did not regard this factual dispute as before it. Pet App. 15a (finding that dismissal was required under holding of *East Columbia*, *supra*, that "'[t]he project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry.'").

precedent] asks whether the alleged injury is related to the project (here, the CVP), *not* whether it is related to a project use for the specific purpose of flood control." (emphasis in original)); *id.* 148 ("The Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were [sic, used] *solely* for irrigation." (emphasis added)).

The government could not make its change in position clearer than in the closing to its Supplement. The government states, without any citation to its briefs below, to the district court's opinion, or to the court of appeals' decision, that "[t]he United States has argued, and the district court and court of appeals have agreed, that even if irrigation is the principal purpose of the Madera Canal, its waters have the relationship to flood control or flood waters required by the Flood Control Act, because flood waters are held by the Friant Dam until discharged into the Madera Canal, the discharge is at times necessary for flood control purposes, and the discharge enables the irrigation function of the canal to proceed." Supp. 9-10. We have already documented the government's failure to make this argument in the lower courts, and it could not be more clear that the lower courts manifestly did *not* accept such a contention. To the contrary, the Ninth Circuit categorically held in this case that the Flood Control Act confers immunity despite the fact that the Madera Canal "is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project." Pet. App. 9a (emphasis added).[4]

---

[4] Respondent now cites for the first time, Supp. 3, the district court's passing statement in entering a judgment under FRCP 54 that "[t]he parties do not dispute that one of the purposes of the Madera Canal is flood control," when the government knows well that Petitioner has maintained throughout this litigation that the Canal serves only irrigation functions. The district court's statement simply reflects its legal conclusion that the government automatically is entitled to immunity because the Canal is part of the CVP, a point made clear from its decision awarding immunity. Pet. App. 11a ("According to Exhibit B attached to the First Amended Complaint, the Madera Canal is part of the Friant Division, Central Valley Project. The parties do not dispute that one of the purposes *of the Central Valley Project* is flood control." (emphasis added)).

4. Respondent next disputes that Petitioner sought to put on its evidence that the Madera Canal serves an irrigation, not flood control, function. Petitioner's Reply collected its repeated assertions to that effect in the district court and court of appeals. Reply 3. Respondent now claims that "[i]n the district court, petitioner never offered such evidence," Supp. 4, but the obvious reason for that fact is that the district court *refused to hold a hearing*, notwithstanding Petitioner's unambiguous position that "Whether 702c Immunity Applies Is A Question Of Fact." C.A. Rec. 93 (emphasis omitted). What else was Petitioner supposed to do when the district court accepted the government's position that evidence was irrelevant? Certainly, we could not agree more that "[t]he fact that the government explained to the district court in this case that it need not conduct fact-finding on whether the waters that caused property damage to petitioner's property were 'flood waters' simply reflected [the Ninth Circuit's] well-established case law." Supp. 4-5. Petitioner's point is simply that Respondent should have advised *this Court* that it successfully took the position in the district court that no fact-finding should be undertaken rather than asserting in the BIO that, for example, "the court of appeals was incorrect in stating that '[t]he [Madera] canal is not a flood control project and serves no flood control purpose,'" BIO 11 n.3, as if some factual development had been undertaken. Moreover, the import of the parties' disagreement is that the district court did *not* hear evidence on this factual question, which will remain open on remand.

5. Finally, we direct the Court's attention to a series of its precedents addressing the question whether the Madera Canal serves irrigation or flood control purposes. *See* Reply 5-6 & n.1 (citing *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)). Respondent says only that "none of the Supreme Court cases cited holds that irrigation is the *only* purpose of the Madera Irrigation District." Supp. 7 (emphasis in original). We disagree, but in any event that was not the point of the Reply. Instead, Petitioner argued that Respondent should have *acknowledged* these decisions (one of which addresses the very Department of the Interior report on which the government relies), which *do* reject the claim that the entire CVP serves flood control functions including specifically with respect to the Friant Dam and the Madera Canal. *E.g.*, *Dugan*, 372 U.S. at 622 ("From the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam. Indeed, it was obvious from the expressed purpose of the construction of the dam – to store and divert to other areas the waters of the San Joaquin – and the intention of the Government to purchase water rights along the river."); *Gerlach*, 339 U.S. at 733 (components of the CVP "are not only widely separated geographically, many of them physically independent in operation"); *id.* at 736 (rejecting government's argument that statement of purpose that CVP served navigation and flood control "is applicable to Friant Dam and related irrigation facilities as an integral part of 'what Congress quite properly treated as a unit'").

* * * * *

We take care to reiterate that Petitioner's Reply Brief was not intended to cause offense to the office of the Solicitor General. The Reply was intended to make abundantly clear that this case squarely presented the important circuit conflict over the scope of the government's immunity under the Flood Control Act, and to take issue with Respondent's suggestion

to the contrary. Our concerns in the Reply were substantial, but certainly not personal.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition and the Reply, the Petition for Certiorari should be granted.

Respectfully submitted,

Timothy Jones
W. Allen Bennett
Sagaser, Franson & Jones, P.C.
2445 Capitol St.
Second Floor
Fresno, CA 92721

Thomas C. Goldstein
(Counsel of Record)
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016

March 10, 2000